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No. 98-1338

In The

Supreme Court of the United States

October Term, 1998

TEXAS ASSOCIATION OF DAIRYMEN, DAIRY PRODUCERS OF NEW MEXICO, LONE STAR MILK PRODUCERS, L.C., and PREMIER MILK PRODUCERS, INC.,

Petitioners,

v.

MINNESOTA MILK PRODUCERS ASSOCIATION, BILL DROPIK, CHESTER KOLSTAD, GREG RADERMACHER, ARNOLD NESS, FREDRICK J. BIANCHI, DELBERT MANDELKO, JOHN FISCHER, LEE JOHNSTON, and LESLIE KYLLO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Minnesota Milk Producers Association and its dairy farmer directors ("MMPA") oppose the Petition for Writ of Certiorari filed by Texas Association of Dairymen, Dairy Producers of New Mexico, Lone Star Milk Producers, L.C., and Premier Milk Producers, Inc. ("Southwest Producers"). In the lower courts MMPA challenged the Class I prices for fluid milk fixed by the federal milk marketing orders issued by the Secretary of Agriculture. MMPA claimed that the milk marketing orders' Class I prices violated provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601, *et seq.* (AMAA), which sets out specific mandates that marketing orders' prices must meet. Specifically, MMPA asserted that the marketing orders' Class I prices do not reflect "economic conditions that affect supply and demand for milk . . . in the marketing area to which the . . . order . . . relates" as required by 7 U.S.C. § 608. Appendix to Petition for Writ of Certiorari (hereinafter "App.") at A82-83.

MMPA also challenged as arbitrary and capricious the Secretary's administrative decision to maintain the current Class I prices issued as the result of a 1990 national administrative hearing addressing price issues in all milk marketing orders. In the lower courts MMPA sought (1) a declaration that the Class I prices fixed by the milk marketing orders are unlawful because they do not meet the pricing mandates of the AMAA, (2) an injunction prohibiting the Secretary's enforcement of the unlawful Class I order prices, and (3) a declaration that the Secretary's administrative decisions to maintain the current Class I prices are arbitrary and capricious.

MMPA initiated the lower court action in January 1990. The district court initially dismissed the case, holding that MMPA's claims were not judicially reviewable and that MMPA lacked standing. The Eighth Circuit Court of Appeals

reversed the dismissal, holding that MMPA had standing and presented claims that were judicially reviewable, and remanded the case to the district court. *Minnesota Milk Producers Ass'n v. Madigan,* 956 F.2d 816 (8th Cir. 1992). App. A52-60.

In the years following the remand, the district court considered several summary judgment motions filed by MMPA. Consideration of MMPA's first motion for summary judgment was stayed to allow the Secretary additional time to issue a final decision in the 1990 national administrative proceedings which the agency had initiated shortly after MMPA's case was filed. *Minnesota Milk Producers Ass'n v. Madigan,* No. 4-90-31 (D. Minn. Jan. 15, 1993) (order granting stay of proceedings to await final decision by USDA.) The district court then twice remanded the case to the Secretary after finding that the administrative decisions were arbitrary and capricious because they did not demonstrate that the Class I order prices complied with the AMAA. *Minnesota Milk Producers Ass'n v. Espy,* 851 F. Supp. 1389 (D. Minn. 1994); *Minnesota Milk Producers Ass'n v. Glickman,* No. 4-90-31 (D. Minn. May 17, 1996). Each remand order granted the Secretary 120 days to issue an amplified administrative decision and authorized him to hold any additional proceedings needed to produce the record evidence necessary to demonstrate that the Class I prices complied with the AMAA pricing mandates.

Finally, on November 3, 1997, in response to MMPA's fourth summary judgment motion, the district court issued an order (1) declaring that the Class I differentials in most of the federal marketing orders are unlawful because they violate the AMAA mandate that order prices reflect the supply and demand conditions in the marketing area to which they apply; (2) enjoining the Secretary from enforcing the Class I differentials declared unlawful; and (3) declaring the final, amplified, and second amplified administrative decisions in

the 1990 national administrative proceedings arbitrary and capricious. *Minnesota Milk Producers Ass'n v. Glickman,* 981 F. Supp. 1224 (D. Minn. 1997). A42-51.

Nearly seven years after the case was commenced and after the district court issued its final judgment, several entities including the petitioners, Southwest Producers, filed motions to intervene along with motions to stay the district court's November 3, 1997, order. The Secretary of Agriculture appealed the district court's November 3, 1997, order and also sought a stay of the injunction. On December 5, 1997, the district court granted, on the Secretary of Agriculture's motion, a short stay of the injunction against enforcement of the Class I differentials and also denied all of the motions to intervene. *Minnesota Milk Producers Ass'n v. Glickman,* No. 4-90-31 (D. Minn. Dec. 5, 1997). App. at A27-41. The Southwest Producers, along with other intervention movants, appealed the denial of their motions to intervene and also appealed the district court's November 3, 1997, order on the merits. All appeals were consolidated before the Eighth Circuit Court of Appeals, giving the Southwest Producers the opportunity to file briefs and argue on the merits of the district court's final judgment as well as on the intervention issue.

On August 13, 1998, the Eighth Circuit Court of Appeals reversed the district court's November 3, 1997, judgment and order. *Minnesota Milk Producers Ass'n v. Glickman,* 153 F.3d 632 (8th Cir. 1998). App. at A1-26. The Eighth Circuit reversed the district court's order for all declaratory and injunctive relief. The court of appeals also affirmed the district court's December 5, 1997, order denying the motions to intervene, finding that the district court had considered the relevant factors and did not abuse its discretion in holding that the motions to intervene—including that of the Southwest Producers—were untimely filed.

MMPA chose not to seek review by this Court of the Eighth Circuit's decision reversing the district court's final judgment and order. MMPA chose to forego a petition for review by this Court because the Secretary is required by federal statute to issue new milk marketing orders before this Court would have time to rule on the merits of MMPA's challenge to the Class I prices in the existing orders. The Agricultural Market Transition Act of 1996 required the Secretary to implement new consolidated milk marketing orders by April 4, 1999. See 7 U.S.C. § 7253. Appendix to this brief (hereinafter referred to as "Opposition App.") at A2. A more recent appropriation bill allows the Secretary to issue the final new consolidated orders by April 4, 1999, but prohibits implementation until October 1, 1999. See Opposition App. at A5. In any case, new consolidated orders must be implemented before this Court would have time to rule on the merits of an appeal by MMPA of the Eighth Circuit's decision on their claims concerning the existing orders.

REASONS FOR DENYING A WRIT OF CERTIORARI

A. A Writ of Certiorari Should Not Be Issued Because There Is No Article III Case or Controversy.

The Southwest Producers should not be granted a writ of certiorari because there is no case or controversy before this Court that meets the requirements of Article III of the United States Constitution. It would be improper for this Court to issue a writ of certiorari when there are no remaining claims through which Article III case or controversy requirements are met. According to this Court, "[t]he case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 476-78 (1990); *see also Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). As this Court has made clear, "[t]hat the dispute between the par-

ties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires." *Honig v. Doe,* 484 U.S. 305, 318 (1987).

On pages 12-17 below, MMPA asserts that the Eighth Circuit properly found that MMPA has standing to bring its claims before the district court and the Eighth Circuit Court of Appeals. However, since the Eighth Circuit ruled against MMPA on all of its claims and MMPA does not seek review of that decision, there are no longer any underlying claims through which an Article III case or controversy can be maintained. The Southwest Producers' Petition for Writ of Certiorari covers only the lower courts' denial of their motion to intervene and the holding that MMPA had standing to challenge the Class I prices in all milk marketing orders. Any interest the Southwest Producers may have asserted in the merits of MMPA's underlying claims was finally resolved in the Southwest Producers' favor when the Eighth Circuit reversed the final judgment and order for declaratory and injunctive relief granted MMPA by the district court.

Once MMPA chose not to seek review of the Eighth Circuit's decision by this Court, any claims for relief that might potentially affect Southwest Producers were eliminated. MMPA's case no longer poses any threat to the Class I prices in the Southwest Producers' marketing orders. This Court should find here, as it did in *Deakins,* that once the relevant claim for relief is eliminated, any defenses to those claims become moot because no Article III case or controversy remains. *Deakins,* 484 U.S. at 199.

Because this case no longer presents case or controversy under Article III of the U.S. Constitution, this Court should deny the Southwest Producers' Petition for Writ of Certiorari.

B. A Writ of Certiorari Should Not Be Issued to Review the Denial of Petitioners' Motion to Intervene Because the Eighth Circuit Decision on Timeliness Does Not Conflict With Decisions in Other Circuits.

The Southwest Producers argue that certiorari is necessary to resolve a conflict among the circuits on the issue of whether a motion to intervene for purposes of appeal is timely if filed in time to perfect such an appeal. Petition at 9. Their claim of conflict in decisions among circuits is wrong. There is no conflict in decisions among the circuit courts on this issue.

Southwest Producers' argument suggests that this Court's decision in *United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977), *rehearing denied,* 434 U.S. 989 (1977), and the decisions of the Courts of Appeal for the D.C., Sixth, and Ninth Circuits cited establish the principle that a post-judgment motion to intervene filed within the time allowed for the filing of an appeal is always timely. See Petition at 10-11. The cited cases do not establish this principle. The cases cited by the Southwest Producers simply establish that in some instances, upon consideration of relevant factors, post-judgment motions to intervene may be considered timely.[1] In none of the cited cases was the fact that the post-judgment motion to intervene was filed within the time allowed for an appeal the sole factor considered in determining time-

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1 The Southwest Producers also cited *Pioneer Investment Services v. Brunswick Assocs.,* 507 U.S. 380 (1993) to support their argument that their motion to intervene was timely filed. MMPA notes that this case is inapposite, being concerned not with timeliness under Rule 24 but rather with the doctrine of "excusable neglect" which allows for late filings when a party has missed a set deadline established in the bankruptcy rules.

liness. Indeed no court has treated the window of time for parties to perfect an appeal as removing timeliness as a threshold inquiry for motions to intervene.

As established by this Court in *NAACP v. New York*, a timeliness determination requires consideration of all of the circumstances of the intervention motion. 413 U.S. 345, 366 (1973). This necessarily involves many factors beyond simply whether the motion was filed within the time to perfect an appeal. The district court and the Eighth Circuit Court of Appeals thus properly considered relevant factors beyond whether the Southwest Producers' post-judgment motion to intervene was filed within the time to perfect an appeal when making their decision on the timeliness issue. As the Eighth Circuit stated:

> The determination of timeliness was committed to the discretion of the District Court. [citation omitted] The Court considered the factors relevant to a determination of timeliness: "how far the litigation had progressed at the time of the motion for intervention, the prospective intervenor's prior knowledge of the pending action, the reason for the delay in seeking intervention, and the likelihood of prejudice to the parties in the action." *Arrow v. Gambler's Supply, Inc.*, 55 F.3d 407, 409 (8th Cir. 1995). It found the movants' proffered reasons that they lacked notice of the action and did not realize its potential effects on their interests "hard to believe" in light of the publications of the Secretary's amplified decisions and the organizations' presumably heightened awareness of and interest in dairy regulation issues. District Court Order at 15 (Dec. 5, 1997). It noted that the movants had not sought to intervene until the latest opportunity, and their delayed entry

> would prejudice the MMPA, who would be forced to respond to the movants' arguments. We believe these findings to be within the Court's discretion.

MMPA, 153 F.3d at 646. App. at A20-A21.

The Southwest Producers' attempt to find a conflict between the Eighth Circuit's decision in this case and the decisions of the Courts of Appeals for the Sixth, Ninth, and D.C. Circuits is misplaced. In *Hodgson v. United Mine Workers of America*, the D.C. Circuit explicitly acknowledged that factors in addition to whether a post-judgment motion to intervene was filed within the time to perfect an appeal are relevant to the consideration of whether the motion was timely. 473 F.2d 118 (D.C. Cir 1972). The decision states that "the court should also look to the related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicant's rights, and the improbability of prejudice to those already parties in the case." *Hodgson*, 473 F.2d at 129. In *Linton v. Commissioner of Health and Environment*, the Sixth Circuit also addressed factors beyond the time to perfect an appeal when making its decision on whether a post-judgment motion was timely. 973 F.2d 1311 (6th Cir. 1992).The *Linton* court stated:

> In determining whether an application for intervention as of right meets the timeliness requirements of Fed. R. Civ. P. 24(a), a court is directed to consider: (a) the point to which the suit has progressed; (b) the purpose for which intervention is sought; (c) the length of time preceding the application during which the applicant knew or reasonably should have known of its interest in the case; (d) prejudice to the original parties due to the failure of the appli-

> cant to apply promptly for intervention upon acquiring the knowledge of its interest; and (e) any unusual circumstances of the case.

Linton, 973 F.2d at 1317. The Ninth Circuit similarly relies upon a multi-factor inquiry when determining timeliness of an intervention motion. See *County of Orange v. Air California*, 799 F. 2d 535, 537 (9th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).[2]

Thus there is no conflict between the Eighth Circuit's decision in this case and the intervention decision of this Court or the circuit courts named by the Southwest Producers. The Eighth Circuit, like the D.C., Sixth, and Ninth Circuits, follows the decisions of this Court in recognizing that factors in addition to whether a motion to intervene is filed within the time to perfect an appeal are relevant in determining whether the motion is timely filed. The Eighth Circuit, like the D.C., Sixth, and Ninth Circuits, follows decisions of this Court in reviewing the district court's decision for an abuse of discretion when addressing all of the relevant timeliness factors.

As noted by the court in *United States v. Blue Chip Stamp Co.*, cases in which intervention is allowed after judgment "typically involve[] a refusal or unwillingness by the losing party to diligently prosecute the lawsuit, this fact not becoming apparent until after the Court's decision." 272 F. Supp.

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2 The Ninth Circuit decision cited by Southwest Producers was *vacated* by this Court in 1997. *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), *vacated sub nom. Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997). As noted by the Ninth Circuit in *League of Latin American Citizens v. Wilson*, that leaves *Yniguez* "wholly without precedential authority." 131 F.3d 1297, 1305, n. 5 (9th Cir. 1997).

432, 436 (C.D. Cal. 1967), *aff'd sub nom. Thrifty Shoppers Scrip Co. v. United States,* 389 U.S. 580 (1968). To be more specific, post-judgment intervention cases generally involve an existing party who through settlement, reallocation of resources, or change in policy can no longer be said to be aggressively advocating the position which the party had pursued prior to judgment and upon which the would-be intervenors (often class members) had relied. This post judgment change in the interest of the existing party then justifies post-judgment intervention in such cases.

This is precisely the situation in all of the cases cited by the Southwest Producers.[3] In *United Airlines,* a putative class member was allowed to intervene to challenge the denial of class certification when it became clear after judgment that the party plaintiffs would not appeal the certification denial. *United Airlines,* 432 U.S. 385. The vacated *Yniquez* involved post judgment intervention "when the only defendant in the case [chose] not to appeal." *Yniquez,* 939 F.2d at 729. In *Hodgson,* the Court of Appeals for the D.C. Circuit found that two events "substantially changed the context" and justified reconsideration of a motion to intervene post-judgment. *Hodgson,* 473 F.2d at 126. *Linton* involved a situation where the Commissioner's ability to represent the interests of the movant ended when it submitted for incorporation in the district court's order a 1990 state Medicaid program plan that included provisions contrary to the movant's interest. *Linton,* 973 F.2d at 1318.

It should be noted that in this case, unlike the cases cited by the petitioners, the original defendant, the Secretary

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3 See also *Associated Builders and Contractors, Inc. v. Herman,* No. 97-5300, 1999 U.S. App. LEXIS 225, at *25-29 (D.C. Cir. Feb. 16, 1999) (rejecting claim that this Court's *United Airlines* decision gave blanket approval to post-judgment intervention).

of Agriculture, continued to aggressively litigate after the district court's final judgment in a manner that protected the Southwest Producers' interests. The Secretary quickly filed an appeal of the district court's final judgment and order and sought a stay of the injunctive relief. On appeal the Eighth Circuit ruled in the Secretary's favor, reversing the relief the district court had granted MMPA. The court of appeals reversed the district court's judgment and order for relief which had precipitated the Southwest Producers' motion to intervene. Because MMPA did not petition for review of that decision by this Court, the merits of MMPA's claims were finally resolved by the Eighth Circuit in a manner that eliminated any potential injury to the Southwest Producers. Now that the district court's order has been reversed and final judgment has issued against MMPA on all claims, the Southwest Producers no longer have a basis under Rule 24(a) of the Federal Rules of Civil Procedure for arguing that they need to intervene to protect their interests in maintaining the Class I prices in their milk marketing orders. This case no longer presents any threat to maintenance of those orders' Class I prices.

For these reasons, a writ of certiorari should not be issued to review the lower courts' denials of the Southwest Producers' motion to intervene.

Because the Southwest Producers' motion to intervene was properly denied by the lower courts and there are no grounds for review of the intervention issue by this Court, the Southwest Producers are not parties to the underlying case. Thus, they have no right to seek review of the second issue raised in their petition—whether MMPA had standing to bring its challenge to the Class I prices set in milk marketing orders covering distant regions. Therefore, if this Court agrees with MMPA's arguments on the intervention issue there is no need to even consider the merits of petitioner's

second basis for their Petition for Writ of Certiorari which is addressed in the following section of this brief.

C. A Writ of Certiorari Should Not Be Issued to Review the Eighth Circuit's Decision That MMPA Had Standing to Raise Its Claims Because it Is Not Contrary to Decisions of This Court and Does Not Conflict With Other Circuit Court Decisions.

The Southwest Producers argue that a writ of certiorari should be issued to review whether MMPA had standing to initiate the underlying action, asserting that the Eighth Circuit's decision on standing contradicts holdings of this Court and creates a conflict between circuit courts on the issue of producer standing to challenge federal milk marketing orders. Their argument is incorrect. The Eighth Circuit's standing decision does not contradict holdings of this Court, and there is no conflict among circuit courts on the issue of standing for milk producers to challenge milk marketing orders.

At the outset of any standing consideration, this Court must understand the basis for MMPA's claim that it had standing to challenge Class I prices in orders covering other regions of the country. MMPA asserts standing to challenge orders covering distant regions because the Secretary has chosen to establish a federal order minimum pricing system in which all milk marketing order prices are interconnected through the Basic Formula Price. The Basic Formula Price reflects on a national basis the changing supply and demand conditions for milk used in manufactured products such as cheese and butter. It acts as the base price for all classes of milk in all marketing orders. The minimum price in each milk marketing order is adjusted only as national supply and demand factors change through the use of the Basic Formula Price. *See, e.g.*, 7 C.F.R. §§ 1068.51 and 1126.51 and First Amplified Decision at 59 Fed. Reg. 42424-25. Opposition App. at A6-9, A10-13, A14-17. A fixed Class I differential,

which increases with the order's marketing area's distance from Eau Claire, Wisconsin, is added to the Basic Formula Price to establish each order's Class I (fluid milk) price. *See, e.g.*, 7 C.F.R. §§ 1068.50(a) and 1126.50(a). Opposition App. at A6 and A10. MMPA asserts that the Secretary's Class I pricing system sets minimum order prices for fluid milk which, contrary to the mandate of the AMAA, 7 U.S.C. § 608(c)(18), App. A82-83, do not reflect economic conditions that affect supply and demand in each order's market. Rather, Class I price differentials in orders covering marketing areas distant from the Upper Midwest are set excessively high, providing incentives to produce milk in excess of Class I (fluid) demand. This Class I-price-driven excess production in orders distant from Minnesota goes into manufactured products such as cheese and butter, driving down the price for these products nationally. This reduction in value of manufactured products is reflected in the Basic Formula Price underlying all class prices in all orders. The Class I-price-driven excess production in distant orders' markets, thus, reduces the value of all class prices fixed by the Minnesota producers' marketing order. Minnesota producers receive less for their milk due to the excess production driven by the unlawfully high Class I prices fixed by marketing orders covering distant regions of the country.

Contrary to the Southwest Producers' assertion, the Eighth Circuit's holding that MMPA had standing to raise its claims does not contradict any decision of this Court. This Court has never addressed the issue of whether producers covered by one marketing order, but whose minimum order prices are affected by prices fixed in other marketing orders, have standing to challenge those other orders. Further, the Eighth Circuit's standing decision in this case is consistent with other decisions of this Court addressing standing to challenge milk marketing orders.

This Court directly addressed the issue of producer standing to challenge federal milk marketing orders in *Stark v. Wickard*, 321 U.S. 288 (1944). In *Stark*, milk producers brought an action "to procure an injunction prohibiting the respondent Secretary of Agriculture from carrying out certain provisions [of a milk marketing order]." *Stark*, 321 U.S. at 289. Those provisions required deductions from producer payments which, in turn, were passed on to cooperatives in which the producers were not members. The Court noted that "[t]here is, of course, no question but that the challenged deduction reduces pro tanto the amount actually received by the producers for their milk." *Stark*, 321 U.S. at 302. The Court went on to discuss the significance of this impact on producers, and the distinction between producers and the public at large when analyzing standing to challenge milk marketing orders:

> [H]is interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers.

Stark, 321 U.S. at 304.

This Court held that the producers had a definite personal right to avail themselves of the protection of the minimum price that would be afforded by a marketing order that complied with the authority granted to the Secretary by the AMAA.[4] *Stark*, 321 U.S. at 303.

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4 Following *Stark*, federal courts have consistently recognized the standing of milk producers to challenge actions of the Secretary that reduced their blend prices or which favored one group of producers over another. *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497 (E.D. Pa. 1986), *aff'd*, 829 F.2d 409 (3rd Cir.

Like the producers in *Stark,* MMPA is asserting on behalf of its milk producer members a "definite personal right" in challenging federal marketing order provisions setting minimum order prices that do not comply with the authority granted to the Secretary by the AMAA and which affect the "the amount actually received by [Minnesota] producers for their milk." The Class I prices in orders covering marketing areas distant from the Upper Midwest are set excessively high, failing to reflect supply and demand conditions in those orders' marketing areas as required by the AMAA. The unlawful prices cause excess production in distant order markets, drive down the Basic Formula Price for all milk covered by the Minnesota producers' marketing order, and reduce the amount Minnesota producers receive for their milk.

The Eighth Circuit's standing decision does not contradict this Court's decisions in *Block v. Community Nutrition Institute,* 467 U.S. 340 (1984), and *United States v. Ruzicka,* 329 U.S. 287 (1946). The standing decisions in those cases

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1987) (dismissed handler challenge because producer members of cooperative could bring challenge in their own behalf); *Blair v. Freeman,* 370 F.2d 229 (D.C. Cir. 1966) (challenged the "nearby differential" paid from the pool to producers close to the urban market); *Smyser v. Block,* 760 F.2d 514 (3rd Cir. 1985) (challenge to transportation credits paid from the pool, without discussion of standing issues); *Walmsley v. Block,* 719 F.2d 1414 (8th Cir. 1983) (location adjustment amendments); *Suntex Dairy v. Bergland,* 591 F.2d 1063 (5th Cir. 1979) (merger of markets reducing blend prices to some producers); *Marketing Assistance Program v. Bergland,* 562 F.2d 1305 (D.C. Cir. 1977) (marketing period rule, affecting termination of blend price protection to producers); *Grant v. Benson,* 229 F.2d 765 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 1015 (1956) (cooperative payment deduction from the pool); *Jones v. Bergland,* 456 F. Supp. 635, 640-41 (E.D. Pa. 1978) (Class I price reductions resulting in reduced average blend price).

involved challenges to milk marketing orders by consumers and handlers respectively. Neither case involved producer challenges to milk marketing order provisions.

Also contrary to the Southwest Producers' assertions, there is no conflict among circuit courts on the issue of producer standing to challenge milk marketing order provisions. In *Farmers Union Milk Marketing Cooperative v. Yeutter,* 930 F. 2d 466 (6th Cir. 1991), the Sixth Circuit upheld producer standing to challenge provisions of milk marketing orders. The Eighth Circuit in the decision at issue here explicitly accepted the Sixth Circuit's analysis, stating:

> We also find the Sixth Circuit's opinion in *Farmers Union Milk Marketing Cooperative v. Yeutter,* 930 F.2d 466 (6th Cir. 1991) persuasive on this point. *Farmers Union* involved milk producers' challenge to a milk-marketing order the producers claimed reduced the prices they received for their milk, in violation of the Act . . . the Court emphasized that "the purpose of the AMAA is wealth redistribution in favor of milk producers." *Id.* at 474. In the Sixth Circuit's view judicial review should be available for a claim that an order issued by the Secretary had the opposite effect, because such review would promote the Act's purpose. Thus, the *Community Nutrition* Court's concern that allowing parties to go outside the regulatory scheme would undermine the objectives of the Act by disrupting the scheme—was not implicated by allowing the producers to bring their claims in Court. We agree with *Farmers Union.*

MMPA, 956 F.2d at 818-19. App. at A56. The Eighth Circuit decision does not create a conflict with the Sixth Circuit.

Nor does the Eighth Circuit decision at issue here conflict with the Ninth Circuit decision in *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985). The *Pescosolido* decision involved the issue of whether orange growers had standing to challenge a federal marketing order for oranges. It did not involve whether milk producers have standing to challenge milk marketing orders. In fact, the Ninth Circuit explicitly recognized that, as to standing issues, milk marketing orders are very different from orange marketing orders and the *Stark* standing analysis does not apply to orange producers' challenges to orange marketing orders.

> The *Stark* exception is limited to situations in which producers claim that some "definite personal right" granted by the statute is being infringed by the Secretary acting outside the scope of his delegated authority . . . Turning to the case before us, the Act nowhere grants producers any "definite personal right" to parity prices for oranges like the minimum prices established for milk at issue in *Stark* . . . the *Stark* exception, therefore, is inapplicable.

Pescosolido, 765 F.2d at 832.

Because the Eighth Circuit's standing decision is not contrary to any of this Court's decisions and does not create a conflict in decisions among circuit courts, this Court should not issue a writ of certiorari to review whether MMPA had standing to raise its claim in the underlying case.

CONCLUSION

This Court should deny the Southwest Producers' Petition for Writ of Certiorari. As a threshold matter, a writ should not be issued because there is no case or controversy that meets the Article III requirements since the merits of all

of MMPA's claims have been finally resolved by the Eighth Circuit in the Southwest Producers' favor.

A writ of certiorari for review of the lower courts' denials of the Southwest Producers' motion to intervene should not be issued because the Eighth Circuit's decision regarding timeliness of that motion demonstrates consideration of the appropriate factors under Rule 24(a) and is not in conflict with other circuit court decisions.

A writ for review of MMPA's standing to bring its claims should not be issued because Southwest Producers were properly denied intervention and, thus, are not parties that have the opportunity to challenge standing. In addition, the Eighth Circuit's decision on standing and judicial reviewability does not conflict with the relevant decisions of this Court and does not create a conflict among circuits on the issue of producers' standing to challenge milk marketing orders.

Dated: March 19, 1999

Respectfully submitted,

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APPENDIX

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Agricultural Market Transition Act
7 U.S.C. § 7253 (1998)

§ 7253. Consolidation and reform of Federal milk marketing orders

(a) Amendment of orders.

(1) Required consolidation. The Secretary shall amend Federal milk marketing orders issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, to limit the number of Federal milk marketing orders to not less than 10 and not more than 14 orders.

(2) Inclusion of California as separate order. Upon the petition and approval of California dairy producers in the manner provided in section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, the Secretary shall designate the State of California as a separate Federal milk marketing order. The order covering California shall have the right to reblend and distribute order receipts to recognize quota value.

(3) Related issues addressed in consolidation. Among the issues the Secretary is authorized to implement as part of the consolidation of Federal milk marketing orders are the following:

(A) The use of utilization rates and multiple basing points for the pricing of fluid milk.

(B) The use of uniform multiple component pricing when developing 1 or more basic formula prices for manufacturing milk.

(4) Effect of existing law. In implementing the consolidation of Federal milk marketing orders and related reforms under this subsection, the Secretary may not consider, or base any decision on, the table contained in section 8c(5)(A) of the Agricultural Adjustment Act (7 U.S.C. 608c(5)(A)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, as added by section 131 of the Food Security Act of 1985.

(b) Expedited process.

(1) Use of informal rulemaking. To implement the consolidation of Federal milk marketing orders and related reforms under subsection (a), the Secretary shall use the notice and comment procedures provided in section 553 of title 5, United States Code.

(2) Time limitations.

(A) Proposed amendments. The Secretary shall announce the proposed amendments to be made under subsection (a) not later than 2 years after the date of enactment of this title [enacted April 4, 1996].

(B) Final amendments. The Secretary shall implement the amendments not later than 3 years after the date of enactment of this title [enacted April 4, 1996].

(3) Effect of court order. The actions authorized by this subsection are intended to ensure the timely publication and implementation of new and amended Federal milk marketing orders. In the event that the Secretary is enjoined or otherwise restrained by a court order from publishing or implementing the consolidation and related reforms under subsection (a), the length of time for which that injunction

or other restraining order is effective shall be added to the time limitations specified in paragraph (2) thereby extending those time limitations by a period of time equal to the period of time for which the injunction or other restraining order is effective.

(c) Failure to timely consolidate orders. If the Secretary fails to implement the consolidation required under subsection (a)(1) within the time period required under subsection (b)(2)(B) (plus any additional period provided under subsection (b)(3)), the Secretary may not assess or collect assessments from milk producers or handlers under such section 8c [7 USCS § 608c] for marketing order administration and services provided under such section after the end of that period until the consolidation is completed. The Secretary may not reduce the level of services provided under the section on account of the prohibition against assessments, but shall rather cover the cost of marketing order administration and services through funds available for the Agricultural Marketing Service of the Department.

(d) Report regarding further reforms.

(1) Report required. Not later than April 1, 1997, the Secretary shall submit to Congress a report--

(A) reviewing the Federal milk marketing order system established pursuant to section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, in light of the reforms required by subsection (a);

(B) describing the efforts underway and the progress made in implementing the reforms required by subsection (a); and

(C) containing such recommendations as the Secretary considers appropriate for further improvements and reforms to the Federal milk marketing order system.

(2) Effect of other laws. Any limitation imposed by Act of Congress on the conduct or completion of reports to Congress shall not apply to the report required under this section, unless the limitation specifically refers to this section.

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Sec. 738. (a) None of the funds appropriated or otherwise made available to the Secretary by this Act, any other Act, or any other source may be used to issue the final rule to implement the amendments to Federal milk marketing orders required by subsection (a)(1) of section 143 of the Agricultural Market Transition Act (7 U.S.C. 7253), other than during the period of February 1, 1999, through April 4, 1999, and only if the actual implementation of the amendments as part of Federal milk marketing orders takes effect on October 1, 1999, notwithstanding the penalties that would otherwise be imposed under subsection (c) of such section.

7 C.F.R. Part 1068
Milk in the Upper Midwest Marketing Area

§ 1068.50 Class and component prices.

Subject to the provisions of § 1068.52, the class prices per hundredweight of milk containing 3.5 percent butterfat and the component prices for the month shall be as follows:

(a) *Class I price.* The Class I price shall be the basic formula price for the second preceding month plus $1.20

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

(d) *Class III-A price.* The Class III-A price for the month shall be the average Central States nonfat dry milk price for the month, as reported by the Department, less 12.5 cents, times an amount computed by subtracting from 9 an amount calculated by dividing .4 by such nonfat dry milk price, plus the butterfat differential times 35 and rounded to the nearest cent.

. . .

§ 1068.51 Basic formula price.

The basic formula price shall be the preceding month's average pay price for manufacturing grade milk in Minnesota and Wisconsin using the "base month" series, as reported by the Department, adjusted to a 3.5 percent butterfat basis using the butterfat differential for the preceding month computed pursuant to § 1068.74 and rounded to

the nearest cent, plus or minus the change in gross value yielded by the butter-nonfat dry milk and Cheddar cheese product price formula computed pursuant to paragraphs (a) through (e) of this section.

(a) The gross values of per hundredweight of milk used to manufacture butter-nonfat dry milk and Cheddar cheese shall be computed, using price data determined pursuant to paragraph (b) of this section and annual yield factors, for the preceding month and separately for the current as follows:

(1) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(i) Multiply the Grade AA butter price by 4.27;

(ii) Multiply the nonfat dry milk price by 8.07; and

(iii) Multiply the dry buttermilk price by 0.42.

(2) The gross value of milk used to manufacture Cheddar cheese shall be the sum of the following computations:

(i) Multiply the Cheddar cheese price by 9.87; and

(ii) Multiply the Grade A butter price by 0.238.

(b) The following product prices shall be used pursuant to paragraph (a) of this section:

(1) *Grade AA butter price.* Grade AA butter price means the simple average for the month of the Chicago Mercantile Exchange, Grade AA butter price, as reported by the Department.

(2) *Nonfat dry milk price.* Nonfat dry milk price means the simple average for the month of the Western Nonfat Dry

Milk Low/Medium Heat price, as reported by the Department.

(3) *Dry buttermilk price.* Dry buttermilk price mans the simple average for the month of the Western Dry Buttermilk price, as reported by the Department.

(4) *Cheddar cheese price.* Cheddar cheese price means the simple average for the month of the National Cheese Exchange 40-pound block Cheddar cheese price, as reported by the Department.

(5) *Grade A butter price.* Grade A butter price means the simple average for the month of the Chicago Mercantile Exchange Grade A butter price, as reported by the Department.

(c) Determine the amounts by which the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk and the gross value per hundredweight of milk used to manufacture Cheddar cheese for the current month exceed or are less than the respective gross values for the preceding month.

(d) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (c) of this section by determining the relative proportion that the data included in each of the following paragraphs is of the total of the data represented in paragraphs (d)(1) and (d)(2) of this section:

(1) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the Department, for the most recent preceding period, and divide by the annual yield factor for nonfat dry milk, 8.07, to determine the quantity (in hundredweights) of milk used in the production of butter-nonfat dry milk; and

(2) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the

Department, for the most recent preceding period, and divide by the annual yield factor for Cheddar cheese, 9.87, to determine the quantity (in hundredweights) of milk used in the production of American cheese.

(e) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (c) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (d) of this section.

7 C.F.R. Part 1126
Milk in the Texas Marketing Area

§ 1126.50 Class prices.

Subject to the provisions of § 1126.52, the class prices for the month per hundredweight of milk shall be as follows:

(a) *Class I price.* The Class I price shall be the basic formula price for the second preceding month plus $3.16

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

(d) *Class III-A price.* The Class III-A price for the month shall be the average Central States nonfat dry milk price for the month, as reported by the Department, less 12.5 cents, times an amount computed by subtracting from 9 an amount calculated by dividing .4 by such nonfat dry milk price, plus the butterfat differential times 35 and rounded to the nearest cent.

§ 1126.51 Basic formula price.

The basic formula price shall be the preceding month's average pay price for manufacturing grade milk in Minnesota and Wisconsin using the "base month" series, as reported by the Department, adjusted to a 3.5 percent butterfat basis using the butterfat differential for the preceding month computed pursuant to § 1126.74 and rounded to the nearest cent, plus or minus the change in gross value yielded by the butter-nonfat dry milk and Cheddar cheese

product price formula computed pursuant to paragraphs (a) through (e) of this section.

(a) The gross values of per hundredweight of milk used to manufacture butter-nonfat dry milk and Cheddar cheese shall be computed, using price data determined pursuant to paragraph (b) of this section and annual yield factors, for the preceding month and separately for the current as follows:

(1) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(i) Multiply the Grade AA butter price by 4.27;

(ii) Multiply the nonfat dry milk price by 8.07; and

(iii) Multiply the dry buttermilk price by 0.42.

(2) The gross value of milk used to manufacture Cheddar cheese shall be the sum of the following computations:

(i) Multiply the Cheddar cheese price by 9.97; and

(ii) Multiply the Grade A butter price by 0.238.

(b) The following product prices shall be used pursuant to paragraph (a) of this section:

(1) *Grade AA butter price.* Grade AA butter price means the simple average for the month of the Chicago Mercantile Exchange, Grade AA butter price, as reported by the Department.

(2) *Nonfat dry milk price.* Nonfat dry milk price means the simple average for the month of the Western Nonfat Dry Milk Low/Medium Heat price, as reported by the Department.

(3) *Dry buttermilk price.* Dry buttermilk price mans the simple average for the month of the Western Dry Buttermilk price, as reported by the Department.

(4) *Cheddar cheese price.* Cheddar cheese price means the simple average for the month of the National Cheese Exchange 40-pound block Cheddar cheese price, as reported by the Department.

(5) *Grade A butter price.* Grade A butter price means the simple average for the month of the Chicago Mercantile Exchange Grade A butter price, as reported by the Department.

(c) Determine the amounts by which the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk and the gross value per hundredweight of milk used to manufacture Cheddar cheese for the current month exceed or are less than the respective gross values for the preceding month.

(d) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (c) of this section by determining the relative proportion that the data included in each of the following paragraphs is of the total of the data represented in paragraphs (d)(1) and (d)(2) of this section:

(1) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the Department, for the most recent preceding period, and divide by the annual yield factor for nonfat dry milk, 8.07, to determine the quantity (in hundreweights) of milk used in the production of butter-nonfat dry milk; and

(2) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the Department, for the most recent preceding period, and divide by the annual yield factor for Cheddar cheese, 9.87, to

determine the quantity (in hundredweights) of milk used in the production of American cheese.

(e) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (c) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (d) of this section.

First Amplified Decision
1990 Administrative Proceedings
59 Fed. Reg. 42424-25 (Aug. 17, 1994)

The Minnesota-Wisconsin (M-W) Price

Prior to adoption of the M-W price, federal milk orders relied upon various procedures to establish a basic milk price. Using different measures, each of these procedures attempted to identify the competitive value of milk used for manufacturing purposes. For example, certain orders variously based class prices on prices paid by specific manufacturing plants, such as the Midwestern Condensary Series; on local plant averages; on a three-product U.S. manufacturing price; or on product formulae, such as the butter/powder or butter/cheese formulae.

One major problem with these pricing methods was the difficulty in keeping the pricing methods up-to-date with changes taking place within the dairy industry. For example, varying local needs required that some milk be shipped from plants to meet fluid demands and thus skewed plant-based formulae by affecting yields and prices of manufactured products produced from reserve milk. Moreover, cost factors, which do not lend themselves to accurate evaluation or precise and timely measurement, also complicated efforts to utilize efficiently these various formulae. Changes in labor costs and technology similarly could not be reflected in these product price formulae in a timely fashion.

Thus, there was growing recognition that a competitive pay price which would automatically adjust to prevailing supply and demand conditions (including feed cost and availability) would provide the most practical and reasonable an-

swer to shortcomings in the then-existing pricing methods. The superiority of using a competitive pay price rests upon the economic principle that dairy processors in a highly competitive economy will tend to purchase milk at prices close to the price an efficient processor could pay for that product. Increasing labor and other costs tend to reduce prices that processors are willing to pay for milk. On the other hand, new assembling, processing, packaging and marketing techniques that reduce costs or increase product returns tend to increase the prices processors are willing to pay producers for milk. As these factors fluctuate, shifts occur in the prices that different processors may be able to pay producers. Other groups of processors must meet or approximate these prices or risk losing their supplies of milk. Similarly, various economic factors affecting producers (i.e., taxes, inflation, feed costs, capital assets costs, salaries, etc.) are automatically reflected in the competitive price that producers are willing and able to charge for their milk. Therefore, a competitive pay price was and is viewed as an excellent and superior indicator of the upward and downward adjustments in costs which are automatically reflected in market prices paid to producers for their milk.

The M-W price is a competitive equilibrium market price that represents an estimate of the average of prices paid to dairy farmers for Grade B milk in Minnesota and Wisconsin by plants producing manufactured dairy products such as butter, nonfat dry milk and cheese. The M-W price was first adopted in 1961 as the basis for setting all minimum classified milk prices in the Chicago Regional marketing area. By 1975, the M-W price had been adopted by all federal milk orders. Both the industry and the Secretary view the M-W price as an accurate indicator of the value of milk in large part because the price reflects all of the supply and demand conditions that must be considered under section 608c(18).

Manufactured dairy products (cheese, butter, and nonfat dry milk) can be made from Grade B or Grade A milk. Because manufactured dairy products are eight to ten times less bulky than raw farm milk and can be stored for much longer periods of time than raw farm milk, these manufactured products are less expensive to move and market than raw farm milk on a per pound basis. As a result, manufactured dairy products can and do compete on a national market basis while competition for raw and packaged fluid milk occurs on a more local or regional level.

Accordingly, since manufacture dairy products (unlike fluid milk) compete in a national market, there is a relationship between the M-W price for Grade B milk and the price of surplus Grade A milk, which, like Grade B milk, is used to produce manufactured dairy products. The M-W price reflects a competitive free market price for raw farm milk and the explicit link between Grade B and Grade A surplus milk prices. Thus, the M-W price automatically incorporates the effects of innumerable economic factors which have an impact on both buyers and sellers including the relative price and availability of feed for dairy cows. Month-to-month changes in the unregulated free market M-W price (i.e., the price of Grade B milk) reflect changes in the overall supply and demand conditions for milk and its products nationally.

Concern for the need to ensure competitive equity among handlers and the existence of basic price differences between adjacent marketing areas also led to the universal adoption of the M-W price in all federal milk orders. Marketing areas which relied on the other basic pricing formulae noted above often resulted in producer prices that were too low compared to those received by Midwestern producers. This situation created a competitive disadvantage for Midwestern processors with respect to sales of such manufactured dairy products as butter, nonfat dry milk and cheese because these products, which compete on a national rather

than "local" market, were more expensive relative to similar products manufactured elsewhere. Consequently, it became clear that a competitive pay price would most accurately indicate the basic value of milk on a national level. Use of the M-W price which, as noted above, is a competitive pay price, automatically indicates the basic value of milk and eliminates the need for making possibly inaccurate judgments concerning particular products, prices, yield factors and manufacturing allowances which otherwise would be used to calculate product price formulae.

In short, the M-W price provides automatic adjustments concerning all of the factors affecting the supply of and demand for milk and its products. Thus, the M-W price has been adopted in all federal milk orders as the "mover" of all Class I and Class II prices and is the Class III price (subject to certain minor adjustments). Using the M-W as the Class III price maintains price coordination between Grade B and surplus Grade A milk supplies used for manufacturing purposes.